

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 22.01.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Cr1.A.No.133 of 2000

M/s Elgi Finance Limited,
rep by its Asst. Manager - Legal
and Authorised Representative
Mr.P.N.Krishnamoorthy .. Appellant/Complainant

vs.

1.R.Prabakaran
2.Ms.R.P.Sudha
3.C.Dhanasekaran ... Respondents/Accused 2,
4 & 5

Prayer: This criminal appeal has been filed under Section 378(5) of CRL PC against the judgment of acquittal in so far as the respondents/accused 2, 4 & 5 are concerned, dated 29.1.1999 made in C.C.no.447 of 1996 on the file of the Judicial Magistrate No.VI, Coimbatore.

For Appellant : Mr.T.S.Ramarathinam

For Respondents : Mr.AR.L.Sundaresan, Senior Counsel,
for Mrs. A.L.Gandhimathi

JUDGMENT

This appeal has been preferred against the judgment in C.C.No.447 of 1996 on the file of the Judicial Magistrate No.VI, Coimbatore. The complainant is the appellant herein. The appeal has been preferred against A2, A4 & A5 alone.

2. The short facts as narrated in the private complaint preferred by the complainant under Section 200 of Cr.P.C relevant for the purpose of deciding this appeal are as follow:-

The complainant is working as a Deputy Manager and Legal advisor of the de jure complainant. The accused have obtained a loan by availing bill discount facility to the tune of Rs.1,00,00,849/-. To discharge the above said loan the accused

have drawn a cheque for Rs.24,99,544/-. When the said cheque was presented in Canara Bank Azhagapuram branch on 14.08.1996, the same was returned with an endorsement that there is no sufficient funds in the account of the accused. Even after knowing that the cheque was bounced, the accused have not cared to discharge the loan. The complainant issued a notice on 23.08.1996 to the accused which was received by the accused on 24.08.1996, but the accused have not chosen to send neither reply nor repaid the debt amount. Hence the complainant has preferred this complaint under Section 138 of the Negotiable Instruments Act.

3. After taking the sworn statement of the defacto-complainant, the complaint was taken on file as C.C.No.147/1996 by the learned Judicial Magistrate and on appearance of the accused copies under Section 207 of Cr.P.C. were furnished to the accused. When the offence was explained to the accused they pleaded not guilty. On the side of the complainant P.W.1 was examined and Exs.P.1 to P.10 were marked.

4. P.W.1, defacto-complainant, would depose that he is working as an Assistant Manager of the de jure complainant-company and Ex.P.1 is the power of attorney given in his name, attested by notary public, authorising him to prefer this complaint on behalf of the de jure complainant-company. He would depose that A2 to A5 are Directors of the Company and only at the request of A2 to A5 on behalf of the first accused bill discounting facility was provided to the accused by the de jure complainant-company and that after availing bill discounting facility to the tune of Rs.1,00,00,849/-, the accused have executed hundials No.11, 13 & 14 on 25.06.1996, but as per the terms and conditions of the said hundials the accused failed to repay the debt and after repeated demand, A3 had drawn a cheque for Rs.24,99,544/- in favour of the complainant and when the said cheque(Ex.P.2) was presented in Canara Bank on 14.08.1996 the said cheque was returned by saying there is no sufficient funds in the accounts of the accused. Ex.P.3 is the memo to that effect issued by the Bank. Ex.P.4 is the debit advice dated 16.8.1996. Even after the fact of dishonouring of the cheque was informed to the accused through a notice dated 23.08.1996 under Ex.P.5 the accused have not repaid the debt amount. Ex.P.6(series) is acknowledgments. Ex.P.7 to P.10 are the certified copies of the hundial issued by the accused in favour of the de jure complainant-company.

5. When incriminating circumstances were put to the accused, the accused denied their complicity with the crime. After going through the available evidence the learned Magistrate has come to a conclusion that A1 and the signatory in Ex.P.2-cheque dated 14.08.1996, which was dishonoured by the Bank i.e A3 alone are guilty of the offence under Section 138 of NI Act and consequently convicted and sentenced A1 and A3 to pay a fine of Rs.12,500/- each

with default sentence and acquitted A2, A4 & A5. Aggrieved by the findings of the learned trial Judge against A2, A4 & A5 alone this appeal has been preferred by the complainant.

6. Now the point for determination in this appeal is whether A2, A4, & A5 are also guilty under Section 138 of NI Act?

7. I have heard the submissions of Mr.T.S.Ramarathinam, learned counsel for the appellant and Mr.AR.L.Sundaresan, Senior Counsel, appearing for the respondents and considered their respective submissions.

8. The Point:-

8(a) Against the conviction against them, A1 and A3 have preferred an appeal in C.A.No.70/1999 before the Additional Sessions Judge, Coimbatore, but the same was dismissed on 1.10.1999. Against that no appeal was preferred.

8(b) The learned counsel appearing for the appellant would contend that A2, A4 & A5 are all the other Directors of A1-company and only at their request they were given bill discounting facility to the tune of Rs.1,00,00,849/- and after availing the said bill discounting facility, they have executed Ex.P.7 to P.10 hundials and hence they are also to be held guilty under Section 138 of NI Act. Section 138 of NI Act runs as follows:-

"Dishonour of cheque for insufficiency, etc., of funds in the account -

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to two year, or with fine which may extend to twice the amount of the cheque, or with both"

Provided that nothing contained in this section shall apply unless -

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty

days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation - For the purpose of this section, 'debt or other liability' means a legally enforceable debt or other liability.

The learned counsel also had drawn the attention of this Court to Section 141 of the NI Act and contended that every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

8(c) On the other hand learned senior counsel appearing for the respondents/accused 2, 4 & 5 would contend that even the complaint was preferred against the accused only under Section 138 of the NI Act and except at para 2 of the complaint that A2, A4 & A5 are directors of the company, there is no specific averment in the complaint regarding the overtact of A2, A4 & A5. The trial Court has held that A3 guilty on the ground that, he as one of the Directors has signed in Ex.P.2-cheque dated 14.8.1996. The learned senior counsel for the respondent relying on 2005 SCC (Cri) 1975 (S.M.S. Pharamaceuticlas Ltd., Vs. Neeta Bhalla and another), contended that it is necessary to aver in the complaint that at the time the offence was committed the person accused was in charge of, and responsible for the conduct of business of the company and without averment being made in the complaint the requirements of Section 141 cannot be said to be satisfied. The exact observation in the above said judgment runs as follows:-

"The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in the statutes extending liability to others. Section 141 of the Act is an instance of specific provision which in case an offence under Section 138 is committed by a company, extends criminal liability for dishonour of a cheque to officers of the company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of

which the principal accused is the company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In other words, persons who had nothing to do with the matter need not be roped in. A company being a juristic person, all its deeds and functions are the result of acts of others. Therefore, officers of a company who are responsible for acts done in the name of the company are sought to be made personally liable for acts which result in criminal action being taken against the company. It makes every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of business of the company, as well as the company, liable for the offence."

So it is clear from the above said dictum that it is to be proved by the complainant that every person who at the time when the offence was committed was in charge of the company, and was responsible to the company for the conduct of business of the company as well as the company, to rope into the offence. Even a perusal of hundials in the case on hand viz. Ex.P.7 to P.10, would go to show that A3 has signed in each of those hundials and not the other Directors viz. A2, A4 & A5.

8(d) The learned senior counsel for the respondents relied on 2006(4) CTC 489 (Sabitha Ramamurthy and another Vs. R.B.S.Channabasavaradhya), and contended that the averments in the complaint must be to show that all the Directors are responsible to clear liability under dishonoured instrument and if the complaint has not satisfied the requirements of law, the complaint is to be quashed. The exact observation in the above said judgment runs as follows:-

"Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the Complaint Petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance of the statutory requirements would be insisted."

In the case on hand also there is absolutely no averment in the complaint against A2, A4 & A5 regarding their involvement in the offence under Section 138 of the NI Act.

8(e) While deciding an appeal against acquittal, as per the ratio decidendi laid down in 2003 SCC (Cri) 161 (C.Antony Vs. K.g.Raghavannair), we have to see whether the findings of the trial Court is perverse or contrary to the materials on record. The exact observation of the Honourable Apex Court in the above said dictum runs as follows:-

"The High Court had lost sight of the fact that it was sitting as an appellate court against a judgment of acquittal passed by the trial Court, therefore, there was an obligation on the part of the High Court to come to a definite conclusion that the findings of the trial Court are either perverse or the same are contrary to the material on record because the High Court could not have substituted its finding merely because another contrary opinion was possible based on the material on record. It was the duty of the High Court to have first come to the conclusion that the conclusions arrived at by the trial Court for good reasons are either unreasonable or as stated above, contrary to the material on record. In the absence of any such finding in our opinion, the High Court was in error in taking a contra-view merely because another view was possible on the material on record."

In view of the above discussion, I am of the considered opinion that it cannot be said that A2, A4 & A5 are also guilty under Section 138 of the NI Act. The learned trial Judge has considered all those point and has come to a correct conclusion that the other Directors except A3 are in no way connected with the offence and has rightly dismissed the complaint against A2, A4 & A5, which does not warrant any interference from this Court. Point is answered accordingly.

11. In the result, the appeal is dismissed confirming the judgment in C.C.No.447 of 1996 on the file of the Judicial Magistrate No.VI, Coimbatore.

Ssv

Sd/
Asst.Registrar

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Sub Asst.Registrar

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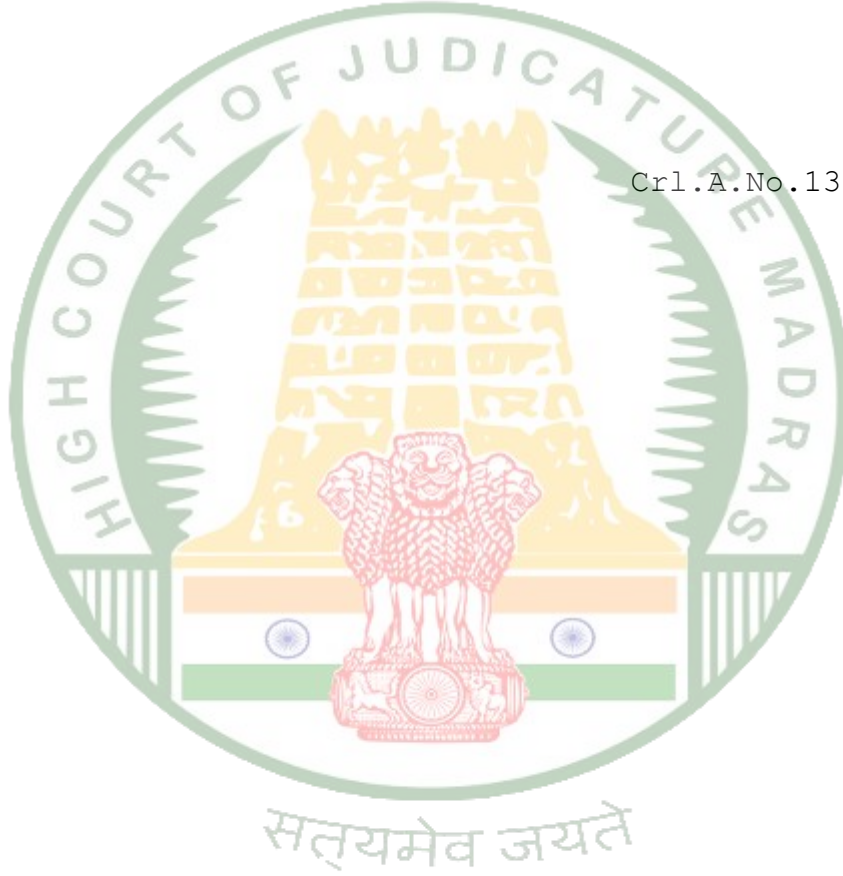
1. The Judicial Magistrate No.VI, Coimbatore.

2. - DO - THRO The Chief Judicial Magistrate Coimbatore

+ one cc to Mrs. A.L. Gandhimathi, Advocate sr no. 4164

NG(CO)

NM(12.02.07)



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